



Asylum Policy: Religious Persecution

Presented by

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Ting Xue v. Sessions

No. 16-____

In the
Supreme Court of the United States

TING XUE,
Petitioner,

v.
JEFFERSON B. SESSIONS III,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

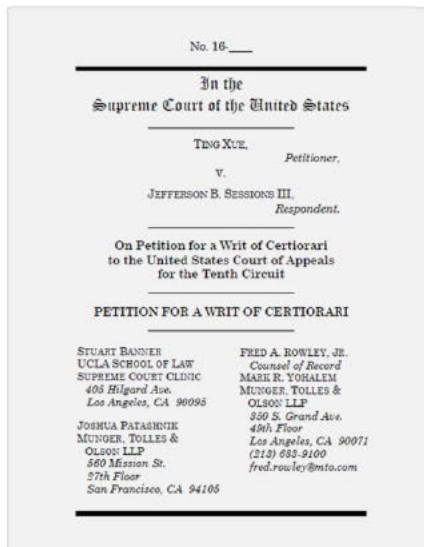
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- For attending an unregistered house church, Xue was
 - arrested
 - beaten
 - jailed for three days and four nights
 - forced to pay a major fine
 - required to take reeducation classes, and
 - warned not to attend illegal church meetings.
- The DJ credited his testimony but denied his asylum petition, saying his fears of future persecution **“do[] not amount to more than a restriction on [his] liberty and thus do[] not rise to the level of persecution.”**
- The BIA affirmed.

Ting Xue v. Sessions



- The Tenth Circuit held that the **“level of harassment”** Xue experienced – “ordered, under threat of penalty, to stop practicing his religion” – was not **“persecution”** under 8 U.S.C. § 1101(a)(42)(A).
- Xue petitioned for certiorari in the U.S. Supreme Court, but his case settled.

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The Key Issue



- The meaning of the phrase **“well-founded fear of persecution” “on account of” “religion.”**
8 U.S.C. § 1101(a)(42)(A).

- The INA’s text refers to
 - **“persecution,”** not to **“severe persecution”**
 - **“religion,”** not **“religious belief”**
- Persecution on account of **“religion”** entails communal and public religious exercise, not simply **“religious belief.”**

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The First Amendment and the Free Exercise of Religion

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...”

U.S. Const., Amend. 1

RFRA and RLUIPA Interpretation of Religious Exercise

“The term ‘religious exercise’ includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.”

42. U.S.C. § 2000cc-5 (2012)

- Both statutes **require** sincerity—thus, sham claims must be weeded out at the outset.

DOJ AG Memo Guidance on Religious Freedom (October 6, 2017)



Office of the Attorney General
Washington, D.C. 20530
October 6, 2017

MEMORANDUM FOR ALL EXECUTIVE DEPARTMENTS AND AGENCIES

FROM: THE ATTORNEY GENERAL

SUBJECT: Federal Law Protections for Religious Liberty

The President has instructed me to issue guidance interpreting religious liberty protections in federal law, as appropriate. Exec. Order No. 13798 § 4, 82 Fed. Reg. 21675 (May 4, 2017). Consistent with that instruction, I am issuing this memorandum and appendix to guide all administrative agencies and executive departments in the execution of federal law.

Principles of Religious Liberty

Religious liberty is a foundational principle of enduring importance in America, enshrined in our Constitution and other sources of federal law. As James Madison explained in his Memorial and Remonstrance Against Religious Assessments, the free exercise of religion "is in its nature an unalienable right" because the duty owed to one's Creator "is antecedent, both in order of time and in degree of obligation, to the claims of Civil Society."¹ Religious liberty is not merely a right to personal religious beliefs or even to worship in a sacred place. It also encompasses religious observance and practice. Except in the narrowest circumstances, no one should be forced to choose between living out his or her faith and complying with the law. Therefore, to the greatest extent practicable and permitted by law, religious observance and practice should be reasonably accommodated in all government activity, including employment, contracting, and programming. The following twenty principles should guide administrative agencies and executive departments in carrying out this task. These principles should be understood and interpreted in light of the legal analysis set forth in the appendix to this memorandum.

1. The freedom of religion is a fundamental right of paramount importance, expressly protected by federal law.

Religious liberty is enshrined in the text of our Constitution and in numerous federal statutes. It encompasses the right of all Americans to exercise their religious liberty, without being coerced to join an established church or to satisfy a religious test as a qualification for public office. It also encompasses the right of all Americans to express their religious beliefs, subject to the same narrow limits that apply to all forms of speech. In the United States, the free exercise of religion is not a mere policy preference to be traded against other policy preferences. It is a fundamental right.

¹ James Madison, Memorial and Remonstrance Against Religious Assessments (June 20, 1785), in 3 THE FOUNDERS' CONSTITUTION 82 (Philip B. Kurland & Ralph Lerner eds., 1987).

"The Free Exercise Clause protects not just the right to believe or the right to worship; it protects the right to perform or abstain from performing certain physical acts in accordance with one's beliefs."

Mem. at 2 (relying on RFRA).

Directing all Departments to "vigorously enforce Federal law's robust protections for religious freedom."

Mem. at 1 (quoting Exec. Order 13798, the Presidential Executive Order Promoting Free Speech and Religious Liberty).

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International Religious Freedom Act of 1998

H.R. 2431

One Hundred Fifth Congress
of the
United States of America
AT THE SECOND SESSION

Enacted and held at the City of Washington on Tuesday,
the twenty-seventh day of January, one thousand nine hundred and ninety-eight

Be It Enacted

That, to support United States foreign policy with respect to, and to strengthen United States advocacy on behalf of, individuals persecuted in foreign countries on account of religion, to authorize United States action in response to violations of religious freedom in foreign countries to establish an Ambassador at Large for International Religious Freedom within the Department of State, a Commission on International Religious Freedom, and a Special Advisor on International Religious Freedom within the National Security Council and to further purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the "International Religious Freedom Act of 2002."

(b) TABLE OF CONTENTS.—The table of contents for this Act is as follows:

Sec. 1. Short title table of contents.

Sec. 2. Findings.

Sec. 3. Definitions.

Sec. 4. Department of State activities.

Sec. 5. Office on International Religious Freedom; Ambassador at Large for International Religious Freedom.

Sec. 6. Commission on International Religious Freedom.

Sec. 7. Special Advisor on International Religious Freedom.

Sec. 8. National Security Council.

Sec. 9. Presidential actions.

Sec. 10. Presidential actions in response to violations of religious freedom.

Sec. 11. Presidential actions to respond to particularly severe violations of religious freedom.

Sec. 12. Consultation.

Sec. 13. Short title table of contents.

"Even more abhorrent, religious believers in many countries face [] severe and violent forms of religious persecution *In many countries, religious believers are forced to meet secretly*, and religious leaders are targeted by national security forces and hostile mobs."

22 U.S.C. § 6401(a)(5) (emphasis added).

"The term 'violations of religious freedom' means violations of the internationally recognized right to freedom of religion and religious belief and practice," "including ... (i) assembling for peaceful religious activities such as worship, preaching, and prayer, including arbitrary registration requirements; (ii) speaking freely about one's religious beliefs."

22 U.S.C. § 6402(16).

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International Norms Reject the Distinction between Belief and Practice

- The United Nations has long accepted the principle that religious beliefs are not separate from religious practice.



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International Norms Reject the Distinction between Belief and Practice



- Universal Declaration of Human Rights, art. 18 (1948):

"Everyone has the right to freedom of ... religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance."

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World of Faith and Freedom



- Advancing religious freedom successfully in our foreign policy can help victims of religious persecution abroad *and* increase the security of the American people.